

C. Alex Naegele (CA Bar No. 255887)
C. ALEX NAEGELE,
A PROFESSIONAL LAW CORPORATION
95 South Market Street, Suite 300
San Jose, CA, 95113
Telephone: (408) 995-3224
Facsimile: (408) 890-4645
Email: alex@canlawcorp.com

[Proposed] Attorney for Kingsway Capital Partners, LLC
Debtor and Debtor in Possession

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re:) Case No. 14-31532 HLB
Kingsway Capital Partners, LLC)
Debtor.) Chapter 11
)
) **SUPPLEMENT TO EX-PARTE
APPLICATION OF DEBTOR FOR
ORDER AUTHORIZING AND
APPROVING EMPLOYMENT OF
COUNSEL**
)
) [No Hearing Requested]
)

**TO THE HONORABLE HANNAH L. BLUMENSTIEL, UNITED STATES
BANKRUPTCY JUDGE:**

Kingsway Capital Partners, LLC, the Debtor and Debtor in Possession herein (the “Debtor”) hereby submits this supplement to the *Ex Parte* Application to Employ C. Alex Naegele, A Professional Law Corporation as general bankruptcy counsel (the “Application”) to address the factors in *In re Atkins*, 69 F.3d 970, 971 (9th Cir. 1995) that will allow the Court to grant *nunc pro tunc* employment to December 4, 2014.

1 **I. STATEMENT OF FACTS**

2 On October 23, 2014, the Debtor filed chapter 11 bankruptcy without an attorney. ECF
3 No. 1. On October 24, 2014, the Court issued an order to show cause why the chapter 11 case
4 should not be dismissed for failure of a corporate debtor to file a chapter 11 case without an
5 attorney. ECF No. 8.

6 From October 24, 2014 until December 4, 2014, the Debtor's responsible individual,
7 Nathaniel Sobayo, looked for an attorney to take on this case and become counsel for the Debtor.
8 Mr. Sobayo consulted with the following attorneys and associations:

- 9 - David W. Wessel, Attorney at Law, with Offices of Boris E. Efron, Portolla
10 Valley, California.
- 11 - Castillo Law Firm, San Jose, California.
- 12 - San Francisco County Bar Association.
- 13 - San Mateo County Bar Association.
- 14 - Santa Clara County Bar Association.
- 15 - Law Offices of David Boone, San Jose, California.
- 16 - Alan Zlotoff, Attorney-at-Law, Menlo Park, CA.
- 17 - Larry Jacobsen, Attorney-at-Law, Redwood City, CA.
- 18 - Gill McDonald, Attorney-at-Law, San Francisco, CA
- 19 - Law Offices Of Hien Doan, Oakland, CA.

20 The Court set a deadline of December 5, 2014 for retaining an attorney or this case would
21 be dismissed. The Debtor found C. Alex Naegele, A Professional Law Corporation, who signed
22 an attorney-client fee agreement and entered an appearance as proposed counsel on December 4,
23 2014 on an emergency basis. C. Alex Naegele, A Professional Law Corporation then provided
24 emergency services from December 4, 2014 to December 18, 2014, by filing immediately filing
25 an opposition to a motion for relief from stay, attending a hearing on a motion for relief from
26 stay, obtaining all the necessary documents for the initial debtor interview and getting these
27 documents to the U.S. Trustee, filing two overdue monthly operating reports, filing a status
28 conference statement, filing an application to designate responsible individual, attending the 341

1 meeting of creditors, attending a status conference, and amending the voluntary petition and
2 schedules.

3 Finally, after performing the necessary emergency services above to keep this case from
4 being dismissed, the Debtor finally filed an Application To Employ C. Alex Naegele, A
5 Professional Law Corporation (the “Application”) on December 22, 2014. The Application
6 sought retroactive employment (i.e. “*nunc pro tunc*”) to the date that C. Alex Naegele, A
7 Professional Law Corporation first started performing services, December 4, 2014 for the
8 necessary, emergency services.

9 **II. ARGUMENT**

10 **A. This Court Is Permitted To Grant *Nunc Pro Tunc* Employment Under The**
11 **Holding Of *In re Atkins*.**

12 When bankruptcy professionals render services on an emergency basis after a chapter 11
13 bankruptcy case has been filed but before an application to employ has been approved by the
14 Court, the bankruptcy court possesses equitable power to approve retroactively professional’s
15 valuable but unauthorized services. *In re Atkins*, 69 F.3d 970, 971 (9th Cir. 1995).

16 In *Atkins*, chapter 11 individual debtors needed an experienced tax accountant and tax
17 lawyer to prepare for an imminent trial in a lawsuit brought by the Internal Revenue Service
18 (“IRS”) against the Debtors. Mr. Atkins, a senior tax accountant, signed an engagement letter
19 with the Debtors, as well as Mr. Whitney, a tax lawyer, who the Debtors also hired. The tax
20 accountant and tax lawyer performed valuable, necessary services for the Debtors in relation to
21 the trial with the IRS. However, the Debtors never filed an application to employ either the tax
22 accountant or tax lawyer. Nevertheless, the tax accountant and tax lawyer sent out invoices for
23 services rendered, which were never paid. *In re Atkins*, 69 F.3d at 971-72.

24 Nearly one year after having performed the services, the tax accountant and tax lawyer
25 filed applications to employ to get paid for their work. The bankruptcy court found that
26 “exceptional circumstances” existed to retroactively approve the work as it was done very
27 quickly and in an emergency setting, and that the firms work helped benefit the estate by
28

1 reducing the IRS's claim from over \$200,000 to \$85,000. On that ground, the bankruptcy court
2 granted *nunc pro tunc* employment. *Id.* at 972-73.

3 The Debtors appealed to the bankruptcy appellate panel ("BAP"), which affirmed. The
4 Debtors appealed again to the ninth circuit, which affirmed. In doing so, the ninth circuit set out
5 several factors to justify *nunc pro tunc* employment on a retroactive basis. These factors are:

- 6 1. The debtor, trustee or committee expressly contracted with the professional
7 person to perform the services which were thereafter rendered;
- 8 2. The party for whom the work was performed approves the entry of the *nunc pro*
tunc order;
- 9 3. The applicant has provided notice of the application to creditors and parties in
10 interest and has provided an opportunity for filing objections;
- 11 4. No creditor or party in interest offers reasonable objection to the entry of the *nunc*
12 *pro tunc* order;
- 13 5. The professional satisfied all the criteria for employment pursuant to 11 U.S.C.A.
14 § 327 (West 1979) and Rule 215 [now Rule 2014] of the Federal Rules of
15 Bankruptcy Procedure at or before the time services were actually commenced
and remained qualified during the period for which services were provided;
- 16 6. The work was performed properly, efficiently, and to a high standard of quality;
- 17 7. No actual or potential prejudice will inure to the estate or other parties in interest;
- 18 8. The applicant's failure to seek pre-employment approval is satisfactorily
19 explained; and
- 20 9. The applicant exhibits no pattern of inattention or negligence in soliciting judicial
21 approval for the employment of professionals.

22
23 *In re Atkins*, 69 F.3d at 974. Here, all nine criteria are met, as set out below, and this
24 Court should grant *nunc pro tunc* employment to December 4, 2014.

25 **B. The Debtor Contracted Directly With The Professional.**

26 This requires that the Debtor directly contract with the professional. As more fully stated
27 in the Declaration of C. Alex Naegele, Exhibit A attached to the Application To Employ, the
28 Debtor did directly contract with C. Alex Naegele, A Professional Law Corporation and the fee
agreement with the Debtor's responsible individual's signature is on the fee agreement.

1 **C. The Debtor Approves *Nunc Pro Tunc* Employment.**

2 As more fully set out in the *Declaration of Nathaniel Sobayo* in support of this
3 supplement, the Debtor approves the retroactive *nunc pro tunc* employment of C. Alex Naegele,
4 A Professional Law Corporation for services rendered from December 4, 2014 onwards.

5 **D. The Debtor Has Provided Notice And Opportunity For Filing Objections**

6 The Application To Employ C. Alex Naegele, A Professional Law Corporation was filed
7 on an *Ex Parte* basis on December 22, 2014, and was served on all creditors in accordance with
8 all laws requiring notice to be served on all creditors. Any such creditor may object to the
9 Application within the time limits proscribed by the filing of *Ex Parte* applications.

10 **E. No Creditor Objects To *Nunc Pro Tunc* Employment.**

11 The Application was filed on December 22, 2014. As of December 29, 2014, no creditor
12 has objected to the Application.

13 **F. The Applicant Is Disinterested.**

14 As more fully set out in the Application, and the *Declaration of C. Alex Naegele* in
15 support thereof, the Applicant, C. Alex Naegele, A Professional Law Corporation, believes that it
16 has met all criterial for employment under 11 U.S.C. § 327 and Federal Rule of Bankruptcy
17 Procedure 2014.

18 **G. The Work Was Performed Properly**

19 C. Alex Naegele, A Professional Law Corporation performed the first sixty (60) days
20 worth of work in a Chapter 11 case in only fourteen (14) days. Moreover, the work performed in
21 these fourteen (14) days was sufficiently of high quality to let this chapter 11 case continue in
22 operation. Therefore, this factor has been satisfied.

23 **H. No Prejudice To Estate**

24 There does not appear to be any prejudice to the estate because this Chapter 11 case is
25 just getting started, and no potential problems about administrative expenses confirming a
26 chapter 11 plan are present as in *Atkins*.

1 **I. Satisfactory Excuse**

2 This element requires that the Applicant, C. Alex Naegele, A Professional Law
3 Corporation have a satisfactory excuse for not obtaining authorization for employment sooner.
4 As more fully set out in the *Declaration of C. Alex Naegele* attached hereto, the Applicant simply
5 did not have time to file the Application To Employ prior to performing the necessary,
6 emergency services to prevent this case from being dismissed. Had the Applicant filed an
7 Application sooner, and not filed the other documents, this case most likely would have been
8 dismissed.

9 **J. No Negligence**

10 This element requires that the Applicant, C. Alex Naegele, A Professional Law
11 Corporation, not have filed the Application late due to inattention or negligence. As previously
12 discussed, the Application was not filed late due to inattention or negligence, but rather because
13 had the Application been brought sooner, and other work not been performed, this case most
14 likely would have been dismissed.

15 **III. CONCLUSION**

16 **WHEREFORE**, the Debtor respectfully requests that this Court approve the
17 employment of C. Alex Naegele, A Professional Law Corporation as counsel, *nunc pro tunc* and
18 retroactive effective as of December 4, 2014, because C. Alex Naegele, A Professional Law
19 Corporation performed necessary, valuable, and emergency services which meet the
20 requirements set out by the ninth circuit in *In re Atkins*, 69 F.3d 970, 971 (9th Cir. 1995).

22 Dated: December 29, 2014

KINGSWAY CAPITAL PARTNERS, LLC

24 _____
25 /s/ Nathaniel Sobayo

26 By: Nathaniel Sobayo, Responsible Individual

1 Submitted by:

2 **C. ALEX NAEGELE**
3 **A PROFESSIONAL LAW CORPORATION**

4
5 By: /s/ C. Alex Naegele
6 C. Alex Naegele (Cal. Bar No. 255887)
7 [Proposed] Attorney for
Kingsway Capital Partners, LLC. Debtor
and Debtor in Possession